SERVED: December 31, 1998

NTSB Order No. EA-4736

UNITED STATES OF AMERICA
**NATIONAL TRANSPORTATION SAFETY BOARD**
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the day of December, 1998

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| DAVID R. HINSON,<br>Administrator,<br>Federal Aviation Administration,<br><br>Complainant,<br><br>v.<br><br>FRED CORNELIUS SLIKKER,<br><br>Respondent. | Docket SE-14082 |

**ORDER DENYING RECONSIDERATION**

The Administrator seeks reconsideration, as authorized by 49 C.F.R. § 821.50, of NTSB Order No. EA-4613, served January 9, 1998, wherein the Board reversed the law judge's decision and dismissed the Administrator's order alleging that respondent violated section 91.13(a) of the Federal Aviation Regulations, 14 C.F.R. Part 91. As discussed below, we deny the petition.

In her petition, the Administrator argues that the Board disregarded evidence that respondent knew or should have known of the hazard that would be created by airborne debris when the aircraft turned around in the run-up area, but does not, and indeed, cannot, point to a portion of the record showing that respondent knew or should have known that there was debris within

the blast footprint of the aircraft.[1]

It was not argued or shown at hearing that the sheer force of the jet blast alone caused the damage to the cars in the parking lot. Instead, the Administrator alleged that sand and pebbles propelled by the blast inflicted the damage, and specifically did *not* allege that respondent employed excessive thrust in executing the turn. See infra, n. 2. A showing that respondent executed the turn and the jet blast propelled debris onto vehicles in a nearby parking lot, in this instance, is insufficient to sustain a violation of section 91.13(a).

Regarding the "idle thrust" issue, the Administrator contends that the Board erred by concluding that the law judge determined the turn was executed using idle thrust. The Administrator is mistaken in her characterization of the Board's conclusions. We merely recognized that, when considering the jet blast, the law judge used the figures for idle thrust in his discussion. Tr. at 508-10. The law judge noted that the Administrator did not allege respondent used excessive thrust, and specifically said that he need not determine what power setting was used, stating it was sufficient simply to determine that the damage was caused by jet blast.[2] Tr. at 503, 508.

Respondent testified that he momentarily used breakaway thrust to get the aircraft rolling, then made the turn under idle power. Tr. at 337-38, 346. The law judge did not make a credibility decision against respondent on this issue. By

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[1]There was insufficient evidence to support a conclusion that the four to five foot area of what Inspector Thorpe characterized as "open ground" was visible to respondent and further, that sand, pebbles, or any other debris was visible to respondent.

The Administrator would have us infer that, because respondent had been based at Lindbergh Field for many years, he must have been aware of sand and pebbles in front of the parking lot. This we decline to do and disagree with the Administrator's assertion that the record reflects that sand or other debris would have been visible to respondent.

[2]At hearing, counsel for the Administrator stated, "[t]he complaint alleges simply jet blast ... that caused damage to a sign and vehicles, meaning at least one car. There's no requirement for us to prove the level of thrust that this captain applied." Tr. at 278-79. The law judge agreed, stating that "[t]he way they framed their complaint[,] all they have to do is show that there was jet blast damage from ... this particular aircraft, not the degree of thrust." Tr. at 279.

asserting that level of thrust was irrelevant to the charge, the Administrator was then required to show that, regardless of the level of thrust employed, the turn was careless. As such, the Administrator had to show that, even at idle power, respondent acted carelessly. This the Administrator failed to do.

The Administrator further argues the respondent admitted that, before making the turn, he determined that the aircraft would create a jet blast of 30 knots in the parking lot –- this, she asserts, would have endangered people and property. Respondent's testimony is taken out of context here, for after this statement, he said that his estimates were conservative and based on calculations for use of minimum thrust (35% N1). Tr. at 341. He maintained that he used idle power (20% N1) to execute the turn. The Administrator did not assert or prove otherwise, nor did she produce evidence to show that jet blast alone, under either idle power or minimum thrust, would have potentially endangered people or property.

The Administrator argues that her interpretation of FAR section 91.13(a) is reasonable and, therefore, the Board must accede to "her assessment of her own regulations," under 49 U.S.C. § 44709(d)(3). Whether her interpretation of the regulation is reasonable is not the issue here, however. The Administrator failed to prove that respondent knew or should have known that the composition of the surface between his aircraft and the cars posed a risk of damage that the jet blast by itself did not, or that the sign fell down as a result of respondent's careless operation of the aircraft. Unless strict liability were the standard, the mere fact that the sign fell could not be enough, in this case, to prove careless operation. While jet blast appears to have precipitated the damage to the cars, the question remains of whether that damage was reasonably foreseeable.

We note that this case, which is very fact-specific, does not signal a departure from precedent. It is still true that "a basic, underlying thread of jet blast (and other) safety cases... is the requirement that pilots, especially PICs, be aware of conditions around the aircraft, including obstacles, and act accordingly, with utmost concern for safety." Administrator v. Fay and Takas, NTSB Order No. EA-3501 at 8 (1992). In the instant case, it was not shown that it was reasonable to expect respondent to know, to have seen, or to suspect that there was sand or other matter on the ground in front of the parking lot and to have been aware that his jet blast would have propelled the debris.

**ACCORDINGLY, IT IS ORDERED THAT:**

The petition for reconsideration is denied.

HALL, Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above order. FRANCIS, Vice Chairman, did not concur. Member GOGLIA submitted the following concurring statement :

I concur with the outcome in this case.

Although the facts of this case did not warrant any finding of violation, any subsequent application of Section 91.13(a) warrants scrutiny. A finding that a pilot acted "carelessly" in violation of Section 91.13(a) must mean more than the fact that damage occurred. Whether Respondent operated the aircraft in a careless or reckless manner must be strictly examined.

The express language of section 91.13 (a) prohibits operation of an aircraft "in a careless or reckless manner so as to endanger the life or property of another." Violation of Section 91.13 (a) requires both danger to life or property of another and careless or reckless operating manner. *Administrator v. Eger,* 2 NTSB 862 (1974). The administrative law judge in this case essentially collapsed these two requirements into one: because there was damage, there must have been carelessness. This "ipso facto" analysis smacks of strict liability, a standard that the Board has repeatedly rejected. See, e.g., *Administrator v. Birmingham and Forham, 7* NTSB 1085 (199 1); *Administrator v.* Zock, 4 NTSB 1544 (1984).

If the language of section 91.13 is to be given effect, the Administrator must be required to prove more than the mere fact of damage. *Administrator v. Birmingham and Forham,* supra, *c.f. Transco Leasing Corporation, et al., v. United States of America, et al* 896 F.2nd 1435 (5th Cir. 1990) and *Steering Committee, et al., v. United states of America and Aeromexico,* 6 F.3d 572 (9th Cir. 1993). He must also prove that the Respondent failed to do all things reasonably necessary for safe operation under the circumstances. Id. "Carelessness" must mean that an individual has failed to do all things reasonable necessary for safe operation.